

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFFREY A. JONES)	
Claimant)	
VS.)	
)	
TARGET WEST, DAYTON/HUDSON CORP.)	Docket No. 199,274
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and the Kansas Workers Compensation Fund appealed the October 18, 1996, Award and the October 21, 1996, Award Nunc Pro Tunc entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Curtis M. Irby of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, William L. Townsley of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Steven L. Foulston of Wichita, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record listed in the Award of the Administrative Law Judge. However, the Award did not list, as part of the record, the deposition of Anthony Pollock, M.D., dated October 9, 1996, and the deposition of Donna Onley, dated October 9, 1996. At oral argument before the Appeals Board, the parties stipulated that

those two depositions should be part of the record and that the Appeals Board should consider those depositions and exhibits admitted therein in the review of the Administrative Law Judge's Award.

STIPULATIONS

The Appeals Board considered the stipulations of the parties listed in the Administrative Law Judge's Award.

ISSUES

The respondent and the Kansas Workers Compensation Fund (Fund) raised the following issues for review by the Appeals Board:

- (1) Nature and extent of claimant's disability.
- (2) Fund liability.

Claimant, in his brief before the Appeals Board, also raised the issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The Administrative Law Judge awarded claimant permanent partial disability benefits of 25 percent based on the permanent functional impairment rating opinion of Ernest R. Schlachter, M.D. The respondent appealed and argued that the claimant's treating physician's, Anthony G. A. Pollock, M.D., functional impairment rating opinion of 20 percent should be equally considered with Ernest R. Schlachter, M.D.'s, 25 percent reducing claimant's entitlement to permanent partial disability benefits to 22.5 percent. In contrast, claimant argues that he is eligible for a work disability in the amount of 35.5 percent based on vocational expert Jerry Hardin's opinion. Following a review of the record, the Appeals Board finds that the 25 percent award entered by the Administrative Law Judge should be modified.

As previously noted, the Administrative Law Judge did not have the benefit of the deposition testimony of claimant's treating physician, Dr. Pollock, when he entered the Award that is the subject of this appeal. Therefore, the Administrative Law Judge did not consider Dr. Pollock's permanent functional impairment rating of 20 percent, reasoning that Dr. Schlachter's opinion was the only opinion fully explored through deposition testimony. Dr. Schlachter saw claimant on one occasion, March 20, 1995, at claimant's attorney's

request for the purpose of evaluating claimant's May 19, 1993, work-related injury. Dr. Pollock, on the other hand, treated claimant's work-related May 19, 1993, low-back injury from July 19, 1993, through May 16, 1994. Additionally, claimant returned to see Dr. Pollock on one other occasion on May 17, 1995, complaining of discomfort in his hip and also in his right knee. Dr. Pollock, a board-certified orthopedic surgeon, performed on August 11, 1993, a three level discectomy from L3 through S1 and fusion from L3 through S1 using rod instrumentation in an effort to relieve claimant of his low back and leg pain. Dr. Pollock released claimant to return to work with permanent restrictions and a 20 percent permanent functional impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised).

The Appeals Board concludes that Dr. Pollock's permanent functional rating of 20 percent should be given, at a minimum, equal weight in determining claimant's permanent functional impairment resulting from his work-related low back injury. Accordingly, the Appeals Board finds that the appropriate permanent functional impairment rating for claimant's work-related low back injury is 22.5 percent. This is found by giving equal consideration to Dr. Pollock's 20 percent functional impairment rating and Dr. Schlachter's 25 percent functional impairment rating.

Following Dr. Pollock's release of claimant with permanent restrictions on May 16, 1994, the respondent returned claimant to his regular job as a maintenance person earning a comparable wage. However, Dr. Pollock's May 16, 1994, medical note indicated that the claimant should not return to his previous employment. Dr. Pollock based claimant's permanent restrictions on a functional capacity evaluation that was performed on February 24, 1994. Those restrictions generally consisted of alternating sitting and standing, single lift limited to 50 pounds, and limited bending and stooping to the frequent category or 34 to 66 percent of the time. Claimant testified, at the regular hearing, that he was employed at his regular job as a maintenance person earning a higher wage than he had earned on May 19, 1993, the date of his accident. However, claimant established that he did not lift more than he felt comfortable lifting and that the respondent had provided him with the assistance of other maintenance employees when needed. Claimant also testified that his low back remained symptomatic and he had to discontinue many personal physical activities that he had performed prior to his accident such as mowing the lawn, snow skiing, and walking.

Claimant's date of accident is May 19, 1993. Therefore, claimant's entitlement to permanent partial disability benefits is determined by K.S.A. 1992 Supp. 44-510e(a), the statute in effect prior to the July 1, 1993, amendments. That statute raises a presumption against a work disability if the employee returns to a post-injury wage comparable to his pre-injury wage. Unless the presumption is rebutted by the claimant, he is limited to permanent partial disability benefits based on his permanent functional impairment rating. Under certain facts and circumstances, the presumption can be rebutted and claimant is then entitled to work disability if higher than his permanent functional impairment rating. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993).

Claimant argues that he has presented evidence through vocational expert Jerry D. Hardin that overcomes the no-work disability presumption. Because claimant returned to work for the respondent at a comparable wage, Mr. Hardin found the wage loss component of the work disability test was zero. Mr. Hardin's personal opinion, utilizing Dr. Pollock's permanent restrictions, was that claimant had a 15 to 20 percent labor market loss and a computer program labor market loss of 14 percent. Utilizing Dr. Schlachter's permanent restrictions, Mr. Hardin's personal opinion was that claimant suffered a 60 to 65 percent labor market loss and a computer program labor market loss of 71 percent.

The Appeals Board finds that the most persuasive opinion in regard to claimant's labor market loss is 40 percent which is arrived at by equally weighing Mr. Hardin's personal opinion utilizing Dr. Pollock's permanent restrictions of 17.5 percent with Mr. Hardin's personal opinion utilizing Dr. Schlachter's permanent restrictions of 62.5 percent. When the 40 percent labor market loss is averaged with a zero percent wage loss, claimant's work disability would equal 20 percent. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

The Appeals Board finds claimant's permanent functional impairment of 22.5 percent is greater than claimant's work disability of 20 percent. The Appeals Board, therefore, concludes that claimant is entitled to permanent partial disability benefits based on the higher permanent functional impairment rating of 22.5 percent. See K.S.A. 44-510e(a). The Appeals Board, also, concludes that it is not necessary to address the question of whether claimant rebutted the presumption against work disability because claimant's disability is based on his higher permanent functional impairment rating.

(2) The Administrative Law Judge found the Fund liable for 32 percent of the Award. The 32 percent contribution for Fund liability was based on Dr. Schlachter's opinion that 8 percent of claimant's 25 percent permanent functional impairment rating preexisted the May 19, 1993, work-related accident.

The Fund argues that the respondent failed to prove that claimant was a handicapped employee before the May 19, 1993, accident. Therefore, the Fund contends that it has no responsibility for any portion of the Award. Respondent, on the other hand, argues that the Appeals Board should exercise its discretion and apportion at least 50 percent of the Award to the Fund.

For the respondent to shift liability to the Fund, it has the burden to prove that claimant had a preexisting permanent impairment of such a character to constitute a handicap in obtaining or retaining employment. See K.S.A. 44-566(b) (Ensley). Furthermore, the respondent has to prove it had knowledge of the handicap and the employee would not have suffered the resulting injury but for the preexisting impairment or the preexisting impairment contributed to the resulting injury. See K.S.A. 1992 Supp. 44-567(a)(1)(2).

The Appeals Board finds that the Administrative Law Judge's conclusion that at the time of claimant's May 19, 1993, injury he was a handicapped employee, respondent retained him in its employment with knowledge of the handicap, and claimant's preexisting impairment contributed 32 percent to the May 19, 1993, injury should be affirmed. This conclusion is supported by the medical records stipulated into the record by the parties, Dr. Schlachter's testimony, and the testimony of Donna Onley, district administrator employed by the respondent. The medical records show the claimant was treated for low back problems as far back as 1983. These records also show that claimant injured his low back at work on July 25, 1990, and November 2, 1990. Furthermore, claimant suffered non-work-related injuries to his low back on April 28, 1992, and April 5, 1993, only one-and-a-half months before the May 19, 1993, injury. Donna Onley, district administrator for the respondent, established that the respondent had knowledge of claimant's work-related low back injuries and non-work-related low back injuries from 1990 up to the May 19, 1993, injury. In fact, the respondent supplied claimant with a back brace in 1992 because of claimant's low back problems. Ms. Onley testified that claimant missed work on and off over the period of years from 1990 to 1993 because of low back problems. Additionally, Dr. Schlachter testified that claimant's previous medical treatment records contained a CT scan taken on July 10, 1991, that indicated that claimant had an L3-4 right sided herniated disc. Dr. Schlachter opined at that time the herniated disc represented an 8 percent pre-existing permanent functional impairment. Furthermore, Dr. Schlachter opined the 8 percent pre-existing impairment was part of claimant's current 25 percent impairment rating.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated October 18, 1996, and the Award Nunc Pro Tunc dated October 21, 1996, should be, and is hereby, affirmed in part and modified in part as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jeffrey A. Jones, and against the respondent, Target West, Dayton/Hudson Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on May 19, 1993, and based upon an average weekly wage of \$508.80.

Claimant is entitled to 51 weeks of temporary total disability compensation at the rate of \$299 per week or \$15,249 followed by 364 weeks of permanent partial general disability benefits at the rate of \$76.32 per week or \$27,780.48 for a 22.5% permanent partial general disability, making a total award of \$43,029.48.

As of September 30, 1997, there is due and owing claimant 51 weeks of temporary total disability compensation at the rate of \$299 per week or \$15,249 followed by 176.86

weeks of permanent partial general disability benefits at the rate of \$76.32 per week in the sum of \$13,497.96 for a total of \$28,746.96, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$14,282.52 is to be paid for 187.14 weeks at the rate of \$76.32 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is ordered to pay 32 percent of the Award.

All remaining orders contained in the Award of the Administrative Law Judge are adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Curtis M. Irby, Wichita, KS
William L. Townsley, Wichita, KS
Steven L. Foulston, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director